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MICHAEL RODAK, JR.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

NO. 74-663

LOUIS SAGER HUNSUCKER,
Petitioner,

V.

ROBERT L. PHINNEY, DISTRICT DIRECTOR
OF INTERNAL REVENUE,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STAYTON, MALONEY,
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RONALD L. PHINNEY, DISTRICT DIRECTOR
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FIFTH CIRCUIT

The Petitioner, Louis Sager Hunsucker, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 29, 1974.

OPINIONS BELOW

The opinions of the Court of Appeals, not yet reported, appear in the Appendix at p. 7a. The opinion of the District Court for the Western District of Texas, which is not yet reported, appears in the

Appendix at p. 12.

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit denying the Petition for Rehearing was entered on August 29, 1974. This Court's jurisdiction is invoked under 28U.S.C. § 1254(1).

QUESTION PRESENTED

1. Whether the District Court had jurisdiction under the provisions of 28 U.S.C. §1356 to hear an action for illegal seizure of Petitioner's property by agents of the United States.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28, § 1356, 62 Stat. 934 (1948).

> The district courts shall have original jurisdiction, exclusive of the Courts of the States, of any seizure under any law of the United States on land or upon water not within admiralty and maritime jurisdiction.

STATEMENT OF THE CASE

On December 23, 1967, agents of the United States conducted a search of Petitioner's apartment, pursuant to a search warrant issued by a United States Commissioner. In the course of the search, certain items alleged to be evidence of gambling activities were seized. The warrant was issued on the basis of an affidavit made by Robert C. Sawyer, a

Special Agent of the Internal Revenue Service.

Petitioner was arrested and charged with violations of 26 U.S.C. §§ 4901, 7203, and 7262. The criminal charges were soon dismissed. The seized materials, however, were delivered to the Internal Revenue Service. Petitioner made repeated but unavailing demands for return of the seized materials.

Thereafter, this action was instituted against Respondent. Petitioner's principal allegations were that the search and seizure was conducted in violation of the rights secured to the Petitioner by the Fourth Amendment of the United States Constitution. The relief sought included return of the seized materials, return of all copies of the materials in the officials, a judgment declaring that the materials had been illegally seized, and an injunction against use of the materials and information therein. Subsequently, the materials seized during the [illegible] were returned to Petitioner. However, the Internal Revenue Service made and retained copies of many of the seized items.

REASONS FOR ISSUANCE OF WRIT

Petitioner's complaint in the district court was that Respondent, through agents of the Internal Revenue Service, had seized Petitioner's property, that this seizure was in violation of Petitioner's Fourth Amendment right to be free from unreasonable seizures by the United States. It is difficult to conceive of an action brought by a citizen that would more precisely meet the literal

terms of 28 U.S.C. §1356.

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of any seizure under any law of the United States on land or upon waters not within admiralty and maritime jurisdiction.

Complaint is made of a seizure by federal agents acting in their official capacities under specific statutory authorization. This fact was not denied by the Court of Appeals in its opinion dismissing this action for want of jurisdiction. Rather, the Court of Appeals reasoned that because Petitioner had alleged "that the seizure was not authorized under Rule 41, F.R. Crim. P.", for purposes of the jurisdictional inquiry the seizure was not under any law of the United States.

Actually, Petitioner's complaint was that whatever statutory or judicial authorization for the search Respondent may have had, the seizure violated Petitioner's Fourth Amendment rights. It has been assumed by all throughout this litigation that Respondent had statutory authority to seek search warrants and to conduct searches pursuant to such warrants. Here, Respondent secured issuance of the warrant under the laws of the United States. Respondent executed the warrant under the laws of the United States. No issue has been raised by anyone that the agents were engaged in a private enterprise when they executed the warrant. Rather, it is precisely because the agents were acting under the laws of the United States that Petitioner makes complaint of violation of his Fourth

Amendment rights. Petitioner's complaint of violation of his Fourth Amendment rights would not lie if the agents had entered his apartment and seized his property while engaged in private activity.

The reasoning invoked by the Court of Appeals was decisively rejected by this Court almost thirty years ago. In Bell v. Hood, 327 U.S.678, 90 L. Ed. 939, 66 S.Ct. 773 (1946), suit was brought against federal agents who had conducted a warrantless search of the plaintiffs' homes, seizing certain materials during the search. The lower courts dismissed the suit for want of jurisdiction, holding that the suit did not arise "under the Constitution and laws of the United States" within the meaning of 28 U.S.C.A. §41(7) [now 28 U.S.C.A. §1331(a)]. The statute here in question, 28 U.S.C.A. §1356, was not discussed.

The crux of the defendant's argument in Bell v. Hood was " . . . that the Constitutional provisions here involved [the Fourth Amendment] are prohibitions against the federal government as a government and that 28 U.S.C.A. §41(1), F.C.A. title 28, §41(1) does not authorize a recovery in money damages in suits against unauthorized officials who according to respondents are in the same position as individual trespassers." 327 U.S. at 683, 90 L. Ed. at 944, 66 S.Ct. at 776 (emphasis added). It is this reasoning, i.e., that complaint of a violation of the Fourth Amendment by a federal agent necessarily precludes a finding that the agent's actions were conducted under the laws of the United States, upon which the Court of Appeals relied in holding that 28 U.S.C.A. §1356

does not supply a jurisdictional basis for this suit. But this Court in Bell v. Hood decisively rejected this reasoning.

The holding in Bell v. Hood was recently reaffirmed in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U. S. 388, 29 L. Ed.2d 619, 91 S. Ct. 1999 (1971). The basis of these decisions is not difficult to ascertain. If the acts of government agents somehow become merely the acts of private individuals when a violation of constitutional guarantees has been thought to occur, the constitutional guarantees become meaningless because these guarantees are effective only against the Government, not private individuals.

The Court of Appeals distinguished Bivens with the observation that in Bivens the Court addressed itself to 28 U.S.C. §1331(a) and therefore the case had no application for construction of 28 U.S.C. §1356. Yet, this simplistic approach overlooks the substantial similarity of the statutory language and, more importantly, the coincidence of policy considerations which merit application of the reasoning in Bell and Bivens to construction of §1356.

The critical language in §1331(a) is ". . . matter in controversy . . . arises under the Constitution, laws, or treaties of the United States." The critical language in §1356 is ". . . seizure under any law of the United States . . ." Quite clearly, the only difference between the two statutes in this regard is the word "arises." Yet, nothing in the meaning of that word or its use in the context of the statute merits the dramatically different constructions the Court of Appeals implicitly gave to each of the statutes.

Just as Webster Bivens stated a cause of action for deprivation of his Fourth Amendment rights because his house was invaded by federal agents, so Petitioner has stated a cause of action questioning the legality of a seizure under the laws of the United States because the 1967 search was conducted by federal agents in their capacities as officers of the United States.

The policy considerations which underlay the decisions in Jaffe and Bivens are equally applicable to construction of §1356. Under the reasoning of the Court of Appeals, no seizure of property by federal agents which is subsequently determined to be in violation of the owner's Fourth Amendment rights is a seizure "under any law of the United States." Only those seizures which are never challenged or which are subsequently determined to be legitimate exercises of governmental authority are "under any law of the United States." This post hoc analysis is completely without justification and renders the statute meaningless. The Court of Appeals functionally read into §1356 the word "valid" so that the statute would read ". . . seizure valid under any law of the United States . . . ."

The last time this Court wrote on the Statute here involved was in 1817. In Slocum v. Mayberry 15 U.S. (2 Wheat.)1, 4 L. Ed. 169 (1817), the Court considered an action brought by the owner of a ship and cargo which had been seized by customs officials. The action was brought for return of the cargo only. Chief Justice Marshall, in examining the predecessor to §1356, distinguished between actions based on seizures made pursuant to statutory authority and those made wholly without

statutory authority. The Court found that whatever authority had been granted to customs officials, that authority extended only to seizure and detention of ships and under no authority were the customs officials empowered to seize and detain cargoes. 2 Wheat. at 17.

There is no hint in Slocum of the reasoning upon which the Court of Appeals relied. To the contrary, the Court in Slocum, [illegible] the [illegible] decision [illegible] to determine [illegible] pursuant to statutory authority.

> If the [illegible] a right, under the laws of the United States to seize for a [illegible] for [illegible], the question, whether this forfeiture has been actually incurred, belongs exclusively to the federal courts, and cannot be drawn in question [illegible] of such [illegible] in the [illegible] foreign. Id. [illegible].

The Court continued [illegible] in which an owner might bring an action for recovery of the ship which was [illegible] pursuant to statutory authority.

> But the act of Congress neither expressly nor by implication forbids the state courts to take cognizance of suits instituted for property in possession of an officer of the United States not detained under some law of the United States . . . . Had this action been brought for the

> vessel instead of the cargo, the case would have been essentially different. The detention would have been by virtue of an act of Congress, and the jurisdiction of the state court could not have been sustained. Id. at 171-172 (emphasis added).

Throughout this litigation, there has never at any time been any suggestion that the agents exceeded the scope of jurisdiction or that federal statutes authorize forcible activities. The sole complaint has been that the agents, in exercising that authority, violated the petitioner's Fourth Amendment rights. Thus, petitioner's claim is analogous to the hypothetical predicated in Slocum and not, as suggested by the Court of Appeals, within the narrow ambit of the holding in Slocum.

CONCLUSION

The decision of the Court of Appeals has transformed 28 U.S.C. 1359 from a statute of mere application for bond citizens and Corporations into a jurisdictional vehicle which may be invoked only by the United States. This construction finds no support in the statutory language. This construction finds no support in this Court's interpretation of the statute's predecessor in Slocum v. Mayberry. The reasoning upon which this construction was based was rejected almost twenty years ago by this Court in Bell v. Hood. This construction is completely contrary to this Court's analysis in Slocum v. Mayberry. Because the opinion of the

Court of Appeals has seriously misapplied a statute of the United States, the Writ of Certiorari should issue to review the decision below.

Respectfully submitted,

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By _____
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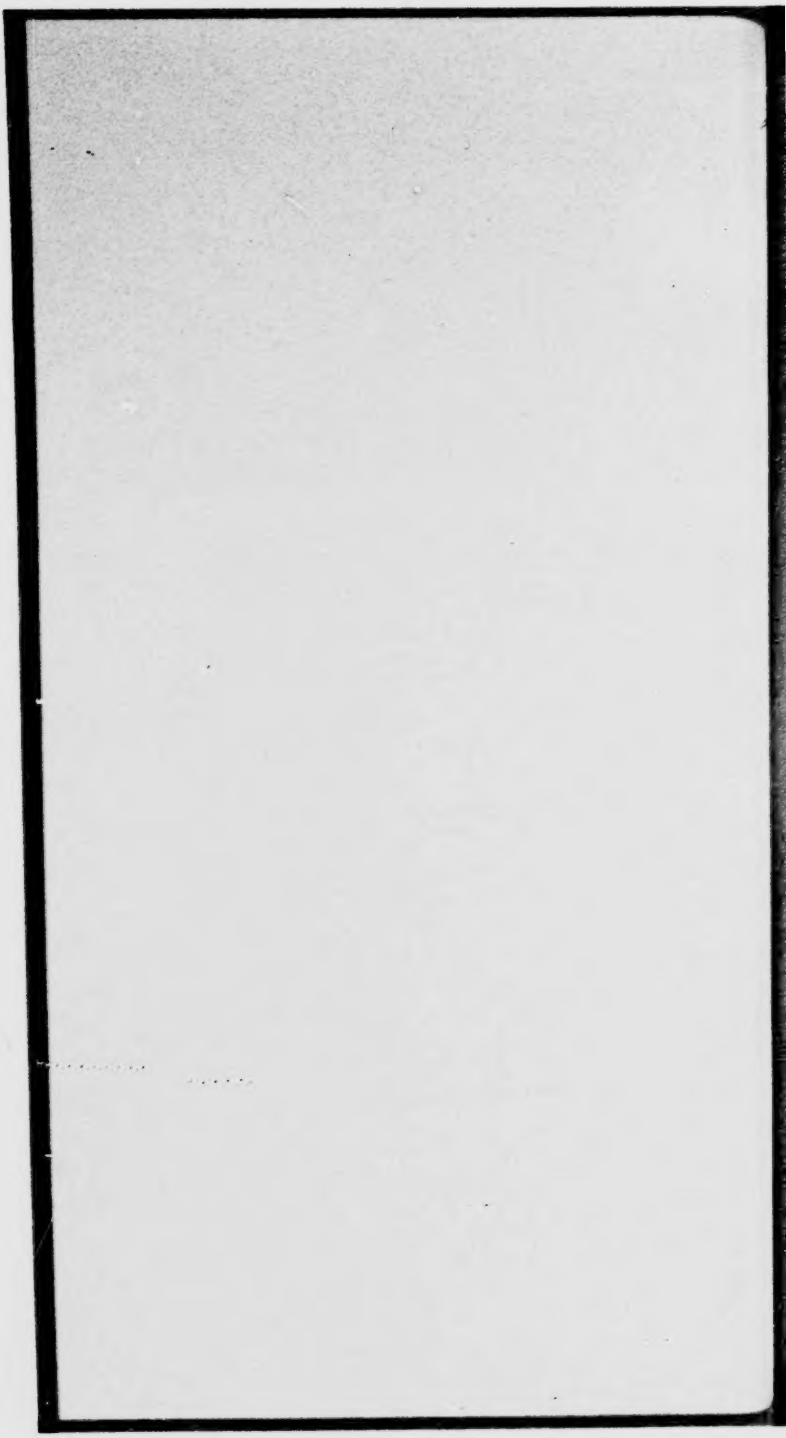
CERTIFICATE OF SERVICE

Pursuant to Rule 33 of the Rules of the Supreme Court of the United States, this Petition for Writ of Certiorari has been delivered to the Solicitor General, Department of Justice, Washington, D.C. 20530 by certified mail return receipt requested.

_____

APPENDIX



DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS

Hunsucker v. Phinney

No. A-69-CA-89

June 7, 1961

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This action came on regularly for trial on June 7, 1971, before this Court, sitting without a jury, the Honorable Jack Roberts, United States District Judge presiding.

The plaintiff in this action appeared and was represented by its counsel of record Douglass D. Hearne. The United States of America was represented by its counsel of record, Seagal V. Wheatley, United States Attorney for the Western District of Texas, through Morris V. Silverstein, Trial Attorney, Tax Division, Department of Justice.

This Court having considered the pleadings, the stipulations, evidence, trial briefs, and oral argument of counsel, and being fully advised in the premises, now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. In this civil action the plaintiff seeks:

(a) A judgment pursuant to 28 U.S.C. §2201 declaring that all the property in the hands of the United States and seized from Apt. 105, 2600 Enfield Rd., Austin, Tx., on or about December 23, 1967, was illegally and unlawfully seized; and that such property be returned and restored to this plaintiff;

(b) That the United States be enjoined and prohibited from the use of such property in connection with any criminal or civil proceedings against this plaintiff; or, in the alternative, that this Court, pursuant to Rule 41(e), Federal Rules of Criminal Procedure, order the defendant to return and restore such property to plaintiff or to conduct an in camera inspection of such property and order it destroyed and inadmissible in evidence in any criminal or civil proceeding.

2. On December 23, 1967, plaintiff's apartment located at 2600 Enfield Rd., #105, Austin, Texas, was searched by agents of the United States Government pursuant to the search warrant issued on December 23, 1967, by the United States Commissioner in Austin, Texas.

3. This search warrant was issued based upon an alleged violation by the plaintiff of §2901, §7203, §7262 and §7302 Internal Revenue Code of 1954.

4. In the course of this search, Special Agent Robert C. Sawyer seized certain bet slips, wager re-cap sheets, and the names and addresses of certain indivi-

duals.

5. The plaintiff was arrested by officers of the United States on December 23, 1967, and charged with violations of Title 23, U.S.C., §4901, §7203 and §7262.

6. Subsequent to January 29, 1968, the criminal action filed against plaintiff in Case No. 104 on the Commissioner's Docket in Austin, Texas, was dismissed by the United States Attorney for the Western District of Texas.

7. Subsequent to the dismissal of the criminal complaint against plaintiff, the property seized during the search of December 23, 1967, was turned over, by the Government to Prosper A. Mika, an Internal Revenue Agent who recommended that an assessment be made against plaintiff for delinquent excise taxes.

8. Agent Mika's recommendation was based upon evidence seized in the December 23, 1967, search. The amount of the assessment recommended by Revenue Agent Mika is $36,167.00, covering the period of time from July 1, 1966 through December 31, 1967, and was a projection of Agent Mika's figures based upon the property seized on December 23, 1967, from plaintiff's apartment.

9. On May 13, 1961, David M. Clore, Special Agent, Internal Revenue Service, returned to Mr. Douglass D. Hearne the following items previously seized by the Internal Revenue Service from Louis S. Hunsucker, Jr.:

2 large paper sacks containing papers and other wagering and pertinent paraphernalia

1 calendar pad

4 ledger books #300 and one small red ledger

4 large 3-47 envelopes containing wagering paraphernalia

8 medium E-42 envelopes containing wagering paraphernalia

1 large envelope addressed to Duck Mallard

10. The Internal Revenue Service has made and retained copies of the following:

Face and hand signals for gin

Memoranda of bets booked

Mileage record

Long Distance Telephone tolls

Base ball schedule

Weekly football schedules

Bowl schedules

Weekly basketball schedules

Telephone and address book

11. The plaintiff has not presented any evidence to show that he would be irreparably injured unless granted the relief requested.

CONCLUSIONS OF LAW

1. This Court has previously upheld its jurisdiction to hear this action by denying the Defendant's Motion to Dismiss in an Order dated April 9, 1970.

2. An injunction suit is not the proper method to question the use of allegedly illegally seized evidence as the basis of a tax assessment.

3. The determination by this Court of whether or not records were illegally seized is premature at this point since no assessment has been made.

4. The taxpayer has an adequate remedy at law in that he can wait until an assessment if any is made, pay the tax for one wager and file a claim for refund. If the refund claim is denied, plaintiff can bring suit for refund under §7422 of the Internal Revenue Code of 1954.

5. The search warrant that forms the basis for this search and seizure was issued with an adequate showing of probable cause therefor having first been made, since the facts and circumstances were within the affiant's knowledge, and he had reasonable trustworthy information sufficient to warrant a man of reasonable caution to believe that an offense was being committed.

6. Marchetti v. United States, 390 U.S. 30 (1968); Grosso v. United States, 390 U.S. 62 (1968) did not invalidate any provisions of the wagering tax statutes.

7. The search warrant that forms the basis for the search was not invalidated by Marchetti, supra, or Grosso, supra.

8. The defendant is entitled to possession of copies of the seized bet

slips, wager re-cap sheets, and the names and addresses of certain individuals.

9. Prior to making an assessment, the District Director of Internal Revenue must make inquiries and determinations as required by §6201. It is premature at this point in an injunction action before the administrative process has been terminated for this Court to determine that the assessment will be based solely on evidence illegally seized, if any evidence was so seized.

10. The relief sought by plaintiff in this action is denied.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Louis Sager HUNSUCKER, Jr.,
Plaintiff-Appellant

versus

Robert L. PHINNEY, District Director of Internal Revenue Service,
Defendant-Appellee

No. 71-2580

July 10, 1974

* * *

Action was brought against District Director of Internal Revenue for a declaration that bet slips, wager recap slips and other items were illegally seized from plaintiff's apartment by agents of the United States, and for order compelling return of seized property and prohibiting its use as evidence against plaintiff. The United States District Court for the Western District of Texas, at Austin, Jack Roberts, J., dismissed suit with prejudice, and plaintiff appealed. The Court of Appeals, Godbold, Circuit Judge, held that even if district court had power to adjudicate issues tendered and to grant relief requested, exercise of that power was tempered by equitable considerations which

justified district court's conclusion that plaintiff's attempt to obtain relief was premature, that statute giving district courts original jurisdiction of any seizure under any law of United States on land or upon waters not within admiralty and maritime jurisdiction did not confer jurisdiction over the action, and that federal question jurisdiction did not exist, but that dismissal of action should have been without prejudice to adjudication of plaintiff's claims in an appropriate future proceeding.

Amended and affirmed.

INDEXED

1. Criminal Law, 394.5(1)
Searches and Seizures, 5

Federal district courts have power to order suppression or return of unlawfully seized property even though no indictment has been returned and thus no criminal prosecution is yet in existence, but this jurisdiction is an exceptional one.

2. Courts, 55

District court's jurisdiction based on its power over its officers should be exercised with caution and restraint, and subject to equitable principles.

3. Gaming, 60

Even if, though likely future proceedings against plaintiff was at least nominally civil in nature rather than criminal,

district court's power over its officers provided a theoretical basis for jurisdiction in action to prohibit use and compel return of copies of allegedly illegally seized bet slips and other items in possession of agents of Internal Revenue Service, exercise of this jurisdiction was governed by equitable principles which did not warrant its invocation, where there was no showing that irreparable injury would result from waiting to vindicate plaintiff's rights until a refund suit could be brought, search was conducted pursuant to warrant issued in normal manner, and original documents were returned to plaintiff.

4. Gaming, 60

Under statute giving district courts original jurisdiction of any seizure under any law of the United States on land or upon waters not within admiralty and maritime jurisdiction, district court did not have jurisdiction to hear action to prohibit use and compel return of copies of bet slips and other items which were illegally seized by agents of United States due to lack of probable cause for issuance of search warrant. 28 U.S.C.A. §1356.

5. Declaratory Judgment, 274

Federal declaratory judgment statute does not confer power to enter declaratory judgment in tax cases. 28 U.S.C.A. §2201, §2202.

6. Courts, 284(3)

In light of fact that, despite $36,000 assessment plaintiff asserted was threatened, plaintiff contended that his action against District Director of Internal Revenue to prohibit use and compel return of copies of bet slips and other items seized by agents of United States was not a tax case but a controversy concerning search and seizure, federal question jurisdiction did not exist. 28 U.S.C.A. §1331.

Appeal from the United States District Court for the Western District of Texas.

Before GODBOLD, DYER and GEE, Circuit Judges.

GODBOLD, Circuit Judge:

Appellant Hunsucker, against whom no civil or criminal proceeding was pending, sued seeking to prohibit the use against him in any action, civil or criminal, of documentary evidence that he claims had been illegally seized. More specifically he sought pursuant to the federal declaratory judgment statute, 28 U.S.C. §2201, §2202, a declaration that the material was illegally seized, and, pursuant to Rule 41(e), F.R.Crim.P.,[1] return of the seized property and an order prohibiting its use as evidence against him. His suit was dismissed with prejudice and he appeals.

These are the relevant facts, as found by the District Court. On December 23, 1967, Hunsucker's apartment was searched

by agents of the United States pursuant to a search warrant issued by a United States Commissioner. Bet slips, wager recap slips, names and addresses and other items were seized. Hunsucker was arrested on the same day and charged with violations of 26 U.S.C. §4901, §7203, and §7262. Subsequently the criminal action was dismissed by the U.S. Attorney, and the seized materials were turned over to an agent of the Internal Revenue Service who, on the basis of these materials, recommended that an assessment of $36,167 be made against Hunsucker for delinquent excise taxes. At the time of trial no assessment has actually been made. Prior to trial in the District Court the seized materials were returned to Hunsucker, but the IRS made and retained copies of some items.

The District Court held that it had jurisdiction and dismissed the action with prejudice. The dismissal appears to be based on alternative conclusions that either (a) determination of whether or not the evidence was illegally seized was premature, or (b) that the search warrant was issued with an adequate showing of probable cause and was not invalidated by the subsequent decisions in Marchetti v. United States, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed. 2d 889 (1968), and Grosso v. United States, 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906 (1968).

Hunsucker asserts that this is not a tax case but a controversy concerning search and seizure. That characterization is a necessary one because, as we discuss below, §2201 does not confer power to enter declaratory judgments in tax cases, and

the use of injunctions against assessments or collection of federal taxes is barred by 26 U.S.C. §7421(a) (subject to certain narrow exceptions). Having attempted to remove himself from the tax field, Hunsucker seeks to obtain an early adjudication of the legality of the seizure by invoking a limited concept of supervisory and equitable powers of the court and a seldom used jurisdictional statute, 28 U.S.C. §1356.

A. Equitable or supervisory jurisdiction.

Hunsucker contends that cases entertaining pleas for supression and return of unconstitutionally seized property prior to any indictment establish that the District Court had jurisdiction. We hold that even if the District Court had the power to adjudicate the issues tendered and to grant the relief requested, the exercise of that power is tempered by equitable considerations which justified the District Court's conclusion that Hunsucker's attempt to obtain relief was premature.

[1] A substantial body of precedent establishes that federal district courts have power to order the suppression or return of unlawfully seized property even though no indictment has been returned and thus no criminal prosecution is yet in existence.[2] Though firmly established, this jurisdiction is an exceptional one. Judge Friendly has observed that one may search the jurisdictional statutes, 28 U.S.C. §§1331-1358, in vain for a grant of

such power in cases where the jurisdictional amount required by §1331(a) is not satisfied, Grant v. United States, 282 F.2d 165, 168 (CA2, 1960), and Judge Wyzanski has referred to the power as "the anomalous jurisdiction," Lord v. Kelley, 223 F.Supp. 684 (D.Mass.1963), appeal dismissed, 334 F.2d 742 (CA1, 1964), cert. denied, 379 U.S. 961, 85 S.Ct. 650, 13 L.Ed. 556 (1965). The theory articulated by most of the cases is that jurisdiction to order suppression or return prior to indictment exists not by virtue of any statute but rather derived from the inherent authority of the court over those who are its officers.[3]

Whether the anomalous jurisdiction extends to cases, such as this one, where the likely future proceeding is at least nominally civil in nature rather than criminal is uncertain. The theoretical basis of the jurisdiction in the court's power over its would seem unaffected. We have encountered only one case, however, in which it appears that the anomalous jurisdiction was exercised where the only likely future proceeding was a civil one, and in that case it was simply exercised without discussion. United States v. Blank, 261 F.Supp. 180 (N.D.Ohio 1966). Some cases suggest in passing that exercise of the jurisdiction is limited to cases of threatened criminal indictment. Thus in Lord v. Kelley, 223 F.Supp. 684, 689 (D.Mass1963), Judge Wyzanski stated,

> Often--perhaps usually--it will be more prudent for a trial court to await the return of an indictment before granting any relief.

> For in many cases the trial court may not be persuaded that the substantial risk facing the aggrieved person is a criminal prosecution, as distinguished from an administrative or civil proceeding.

See also Fifth Avenue Peace Parade Committee v. Hoover, 327 F.Supp. 238, 242 (S.D. N.Y.1971). Certainly where a criminal indictment is threatened one reason for early adjudication of the admissibility of evidence exists which is not present where only a civil proceeding is threatened: the criminal indictment itself carried a danger of stigmatization which may not be removed by a determination in the criminal trial that the evidence on which the indictment was based is inadmissible. See In re Fried, 161 F.2d 453, 458 (C.A.2,1947)(opinion of Frank, J.). Hunsucker argues that even if a threatened criminal prosecution is usually necessary, the threat of an assessment for unpaid gambling taxes sufficiently resembles a threat of criminal indictment to bring this action within the cases dealing with pre-indictment suppression or return where a criminal indictment is threatened. We do not determine in this case whether exercise of the anomalous jurisdiction is limited to instances where criminal prosecution is threatened nor do we determine whether the threat of a gambling tax assessment is a surrogate for threatened prosecution. Rather, we have assumed that for one reason or the other the cases dealing with pre-indictment suppression or return are applicable here.

The documents which are the immediate

subject of the present dispute are apparently in the hands of agents of the Internal Revenue Service, and the question arises whether these persons are subject to the court's power over its officers. A number of older cases suggest not,[4] but more recent cases indicate that the court's supervisory power is adequate to reach IRS agents as well as those who are traditionally regarded as officers of the court.[5] We pretermit the question and assume for purposes of this case that the District Court had supervisory power over the IRS agents in possession of the documents.

[2] But even if the District Court's power over its officers provides a theoretical basis for jurisdiction in this case, it does not automatically follow that this unique power should be exercised wherever it exists. Rather such jurisdiction should be exercised with "caution and restraint,"[6] and "subject to equitable principles."[7] The applicability of equitable principles is the same whether the present action is viewed as one brought under Rule 41(e), F.Crim.P., or as one premised on the equity jurisdiction of the District Court. In either event the theoretical basis of jurisdiction to order pre-indictment return or suppression is grounded in the court's supervisory power over its officers. As the Court of Appeals for the District of Columbia Circuit has observed, Rule 41 "is a crystallization of a principle of equity jurisdiction. That equity jurisdiction persists as to situations not specifically covered by the Rule. Alternatively the

same result can be reached by a broad reading of the Rule." Smith v. Katzenbach, 122 U.S.App.D.C. 113, 351 F.2d 810, 814 (1965).[8]

[3] Having concluded that exercise of the anomalous jurisdiction which Hunsucker seeks to invoke is governed by equitable principles, we must inquire whether those principles warrant jurisdiction in this case. The government argues and the District Court concluded that Hunsucker had an adequate remedy at law in that he could wait until an assessment was made, pay the tax for one wager and file a claim, and if necessary a suit, for refund.[9] Hunsucker's counter-argument, that he would be required to incriminate himself in order to prevail in the refund suit, is the same argument which a majority of this Court en banc found "unpersuasive" in Lucia v. United States, 474 F.2d 565 (CA5, 1973). There was no showing that irreparable injury would result from waiting to vindicate his rights until a refund suit could be brought. The District Judge specifically found that, "The plaintiff has not presented any evidence to show that he would be irreparably injured unless granted the relief requested," and this finding was not contested on appeal. Nor since the search in issue was conducted pursuant to a warrant issued in the normal manner could we say that the action which Hunsucker seeks to attach involved a "callous disregard for. . .constitutional rights."[10] The material return of which is sought consists of copies made by the IRS of bet memoranda, telephone and mileage records, sports schedules, a telephone and address book, and "face and hand

signals for gin." We do not doubt that Hunsucker retains an interest in the copies sufficient to allow him to demand their return if the originals, already restored to him, were unlawfully seized. See, e.g. United States v. Kraus, 270 F. 478 (S.D. N.Y 1921)(Hand,J.). But the question here is not whether he has such a right but when the legality of the seizure is to be adjudicated. The return of the originals prior to trial in the District Court forecloses the possibility that equitable intervention might have been justified on the theory that some of these materials were necessary to conduct a legitimate business or were otherwise of substantial value to Hunsucker. Cf. Eastus v. Bradshaw, 94 F.2d 788 (CA5, 1938). In short we find no equitable consideration which would warrant invoking the anomalous jurisdiction to adjudicate the merits of this case.

B. 28 U.S.C. §1356

In his complaint Hunsucker claimed jurisdiction based on 28 U.S.C. §1356. While this claim was not pressed on appeal, we must nevertheless consider it. §1356 confers upon district courts "original jurisdiction. . .of any seizure under any law of the United States on land or upon waters not within admiralty and maritime jurisdiction." This section has seldom been a subject of reported litigation. The few cases existing uniformly fail to provide decisional support for finding jurisdiction under the section in this case.

In Slocum v. Mayberry, 15 U.S.(2,Wheat)

1, 4 L.Ed. 169 (1817), Chief Justice Marshall interpreted the original Judiciary Act provision from which §1356 is drawn. He held that where an officer of the United States was without authority to seize or hold property the courts of the United States had no jurisdiction to entertain the owner's action for relief[11] but that the state courts remained a proper forum for such actions.

One hundred forty years later the Ninth Circuit applied Slocum to deny a claim of jurisdiction under §1356. In Johnston v. Earle, 245 F.2d 793 (CA9, 1957), the plaintiff brought an action for damages against agents of the IRS for alleged tortious conversion of plaintiff's tractor. The court, reasoning in part that "the complaint alleges that the seizure was not under any law of the United States," (original emphasis) held that §1356 did not confer jurisdiction and that proper forum for damages or replevin actions lay in the state courts.[12] Similarly Hunsucker's allegation is that the seizure was not authorized under Rule 41, F.R.Crim.P., because probable cause was lacking. The analysis of Slocum as applied in Johnston indicates that this allegation is not cognizable under §1356.

[4] We have found no construction of §1356 which would confer jurisdiction over this action. We decline to create one.

C. 28 U.S.C. §1331

[5,6] Hunsucker did not contend that 28 U.S.C. §1331 federal question jurisdiction exists in this case. We believe he

was correct in not making such a contention. The only means by which Hunsucker could have satisfied the jurisdictional amount requirement would be by conceptually linking his action to the $35,000 assessment he says was threatened at the time this action was begun. But linking the threatened assessment to the present action would compel a conclusion which Hunsucker has assiduously denied, for it would imply that the present action is a controversy concerning federal taxes rather than on relating solely to searches and seizures. And if it is a tax case, it is a case in which the court lacks power to grant the declaratory relief requested,[13] and in which injunctive relief is not available absent exceptional circumstances not shown to be present here. See 26 U.S.C. §7421(a); Miller v. Standard Nut Margarine Co., 284 U.S. 498, 52 S.Ct. 260, 76 L.Ed. 422 (1932); Enochs v. Williams Packing & Navigation Co., Inc. 370 U.S. 1, 82 S.Ct. 1125, 8 L.Ed.2d 292 (1962). See also, Brittingham v. United States Commission of Internal Revenue, 451 F.2d 315 (CA5, 1971); Koin v. Coyle, 402 F.2d 468 (CA7, 1968); Zamaroni v. Philpott, 346 F.2d 365 (CA7, 1965); Vuin v. Burton, 327 F.2d 967 (CA6, 1964). Cf. Campbell v. Guetersloh, 387 F.2d 878, 881 (CA5, 1961). Accepting Hunsucker's argument that this is not a tax case, or at least that he did not intend it to be, we are unable to find jurisdiction under §1331.

Exercise of non-statutory equitable or supervisory jurisdiction is not warranted in this case, and we find no basis for statutory jurisdiction. The District Court correctly dismissed the action, but that

dismissal should have been without prejudice to adjudication of Hunsucker's claims in an appropriate future proceeding. The judgment is amended to provide that the dismissal was without prejudice and as so amended is affirmed.

ON PETITION FOR REHEARING

[1-3] Appellant's Petition for Rehearing urges as two additional bases for District Court jurisdiction 28 U.S.C. §§1346(a)(2) and 1361. Reliance on the "Tucker Act," §1346(a)(2), is misplaced. That Act applies only to suits for money damages while appellant seeks equitable relief. See, e.g., Wells v. United States, 280 F.2d 275 (CA 9, 1960); Clay v. United States, 93 U.S.App.D.C. 119, 210 F.2d 686 (CADC, 1953), cert. denied, 347 U.S. 927, 74 S.Ct. 530, 98 L.Ed. 1080 (1954); Lowe v. United States, 347 F.Supp. 1252 (W.D. Pa. 1972). Assuming without deciding that §1361 mandamus jurisdiction is potentially available, those factors found in the original opinion to preclude exercise of equitable or supervisory jurisdiction also make mandamus relief inappropriate.

The Petition for Rehearing is denied.

* * *

[1]At the time of trial, Rule 41(e), F.R.Crim. P. provided:

> (e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of

for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

[2] See, e.g. Go-Bart Importing Co. v. United States, 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374 (1931); In re Grand Jury Proceedings, 450 F.2d 199 (CA3, 1971), aff'd sub nom., Colbard v. United States, 408 U.S 41, 92 S.Ct. 2357, 33 L.Ed.2d 179 (1972); Smith v. Katzenbach, 122 U.S.App.D.C. 113, 351 F.2d 810, 815-816 (1965); Austin v. United States, 297 F.2d 356 (CA4, 1961), mandate recalled and appeal dismissed, 353

F.2d 512 (1962); Grant v. United States, 282 F.2d 165 (CA2, 1960); Hastus v. Bradshaw, 94 F.2d 788 (CA5, 1938), cert. denied, 304 U.S. 576, 58 S.Ct. 1046, 82 L.Ed. 1539; Foley v. United States, 64 F.2d 1 (CA5, 1933), cert. denied, 289 U.S. 762, 53 S.Ct. 766, 77 L.Ed. 1505; Goodman v. Kane, 48 F.2d 32 (CA8, 1931); United States v. Bell, 120 F.Supp. 670 (D.C.D.C.1954); Silverman v. Yellowley, 290 F. 248 (D.C.S.D.1923); United States v. Bee, 219 F. 1019 (D.N.J. 1915). Cf. In re Fried, 161 F.2d 453 (CA2, 1947), cert. granted, 332 U.S. 804, 67 S.Ct. 1755, 91 L.Ed. 1370, writ dismissed, 332 U.S. 807, 68 S.Ct. 105, 92 L.Ed. 384 (pre-indictment suppression of confession on fifth amendment grounds).

[3] The classic statement of the theory is that contained in Judge Hough's opinion in United States v. Maresca, 266 F. 713, 717 (S.D.N.Y.1920):

> Whenever an officer of the court has in his possession or under his control books or papers, or (by parity of reasoning) any other articles in which the court has official interest, and of which any person (whether party to a pending litigation or not) has been unlawfully deprived, that person may petition the court for restitution. This is taken to be an elementary principle, depending upon the inherent disciplinary power of any court of record.
>
> Attorneys are officers of the court, and the United States attorney does not by taking office escape from this species of pro-

fessional discipline. Thus power to entertain this motion depends on the fact that the party proceeded against is an attorney, not that he is an official known as the United States attorney. It is further true that the right to move does not at all depend on the existence of this indictment; it might be made, were no prosecution pending.

See also, e.g. Go-bart Importing Co. v. United States, 282 U.S. 344, 51 S.Ct. 150, 75 L.Ed. 374 (1931); In re Grand Jury Proceedings, 450 F.2d 199 (CA3, 1971); Smith v. Katzenbach, 122 U.S.App.D.C. 113, 351 F.2d 810, 815-816 (1965); Cruise v. United States, 282 F.2d 165 (CA2, 1960); Contacchio v. Garrity, 198 F.2d 382 (CA1, 1952), cert denied, 344 U.S. 866, 73 S.Ct. 108, 97 L.Ed. 672; Eastus v. Bradshaw, 94 F.2d 788 (CA5, 1938); Foley v. United States, 64 F.2d 1 (CA5, 1933); Applybe v. United States, 32 F.2d 873 (CA9, 1929), cert. denied, 280 U.S. 594, 50 S.Ct. 39, 74 L.Ed. 641; Fifth Avenue Peace Parade Committee v. Hoover, 327 F.Supp. 238 (S.D.N.Y.1971); Silbert v. United States, 275 F.Supp. 765 (D.Md.1967); Rodgers v. United States, 158 F.Supp. 670 (S.D.Cal.1958), mandamus denied, see D.C., 158 F.Supp. 684; United States v. Bell, 120 F.Supp. 670 (D.C.D.C. 1954); United States v. Mahon, 42 F.2d 571 (S.D.N.Y. 1930); Sims v. Stuart, 291 F. 707 (S.D.N.Y.1922); United States v. Hee, 219 F. 1019 (D.N.J.1915).

A few cases--e.g. Foley v. United States, supra, Smith v. Katzenbach, supra, and In re Fried, 161 F.2d 453 (CA2, 1947)--refer to the theoretical basis of this

jurisdiction as the power of the court to "reach forward to control the improper preparation of evidence which is to be used in a case coming before it, and. . .by summary procedure [to] restrain oppressive or unlawful conduct of in-court officers." Foley v. United States at 5. We doubt that the "reaching forward" [illegible] a distinct jurisdictional [illegible] rather it appears to help define the [illegible] in which the power derived from authority over officers of the court should be exercised. Our resolution of this case, however, makes it unnecessary for us to decide here either whether jurisdiction could be maintained on a "reaching forward" theory in circumstances where the person in possession of the goods was not an officer subject to the court's direction or whether the power over officers should only be exercised where some future proceeding is contemplated before the same court. Cf. Eastus v. Bradshaw, supra.

[4] See, e.g., Bartus v. Bradshaw, 94 F.2d 788, 789 (C.A.5, 1938); Applyby v. United States, 32 F.2d 873 (C.C.A.9, 1929); United States v. Doe, 219 F. 1019 (D.C.D.1915).

[5] See, e.g. Smith v. Katzenbach, 122 U.S. App.D.C. 113, 351 F.2d 810, 816 (1965); Lord v. Kelley, 223 F.Supp. 684, 688-689 (D.Mass. 1963); United States v. Bell, 120 F.Supp. 670, 673 (D.C.D.C.1954).

[6] Fifth Avenue Peace Parade Committee v. Hoover, 327 F.Supp. 238, 242 (S.D.N.Y.1971).

[7] Lord v. Kelley, 223 F.Supp. 684, 689 (D.Mass.1963), citing Centracchio v. Garrity, 198 F.2d 382 (C.A.1, 1952). See also Donlon v. United States, 331 F.Supp. 979, 980 (D.Del.1971) ("[a] pre-indictment motion to return evidence not tied to an existing criminal proceeding is grounded upon equitable considerations. The court has jurisdiction. . .but in the discretion may refuse to hear it on its merits."); 3 C. Wright, 3 Federal Practice and Procedure, Criminal 672, p. 119 (1969) ("[a pre-indictment motion for the return and return] is quite similar to [equitable] tion. Recent cases hold that it should be exercised with caution and restraint, and that the motion should be dismissed for want of equity if the moving party has an adequate remedy otherwise or if he cannot show irreparable injury.")

[8] With an exception not pertinent here, the notes of the Advisory Committee on Rules concerning Rule 41(e), F.R.Cr.P., state that the rule "in a restatement of law and practice."

[9] We note that this is a case where at the time of trial it appeared likely that no future proceeding would be available in which Hunsucker could vindicate his rights. Indeed the threat of abatement seems to have been what prompted Hunsucker to file this action. Where no future proceeding in which the plaintiff may vindicate his rights seems likely, it becomes more difficult to find an adequate remedy at law [consider, however, the possibility of state court actions in trespass or replevin,

cf. United States v. Nirenberg, 19 F.R.D. 421 (E.D.N.Y.1956)], and exercise of the anomalous jurisdiction may conceivably be appropriate. Cf. In re Grand Jury Proceedings, 450 F.2d 199 (CA3, 1971).

[10] See Silbert v. United States, 275 F.Supp. 765 (D.Md.1967), in which Judge Frank Kaufman suggests that whether the allegations of the complaint show such "callous disregard" is a factor to be considered in determining whether to exercise jurisdiction in cases involving pre-indictment suppression and return. See also United States v. Marie-Louise Thompson, 254 F.2d 366 (CA5, 1958), cert. denied, 357 U.S. 938, 78 S.Ct. 1395, 2 L.Ed.2d 1551 ("It is established law that suppression of evidence prior to an indictment should be considered only when there is a clear and definite showing that constitutional rights have been violated."); Parrish v. United States, 256 F.Supp. 793 (E.D.Va. 1966), appeal dismissed, 376 F.2d 601 (CA4, 1967)(whether plaintiff's show a "clear deprivation of their constitutional rights" is a factor in determining whether equitable relief should be granted).

[11] Unless the action was one which could be entertained by the court sitting in admiralty.

[12] We do not read Bivins v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), to implicitly change the analysis of §1356. As Justice Harlan's concurring opinion makes clear, jurisdiction in that case was premised on 28 U.S.C. §1331(a).

See 403 U.S. at 398, 91 S.Ct. at 2005, 29 L.Ed.2d at 628.

[13] The Declaratory Judgments Act excludes federal tax cases from the grant of declaratory authority. Title 28, §2201 provides that:

> "In a case of actual controversy within its jurisdiction, except with respect to federal taxes, any court of the United States. . .may declare the rights and other legal relations of any interested party. . . ."